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Attorneys for Plaintiff
BAYTREE CAPITAL ASSOCIATES, INC.

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

BAYTREE CAPITAL ASSOCIATES,
LLC, derivatively on behalf of,
BROADCASTER, INC.

Plaintiff,

- against -

NOLAN QUAN, MARTIN R. WADE
III, BLAIR MILLS, RICHARD
BERMAN, ANDREW GARRONI,
JASON BRAZELL, ROBERT GOULD,
SANGER ROBINSON, ALCHEMY
COMMUNICATIONS, INC.,
FROSTHAM MARKETING, INC.,
PACIFICON INTERNATIONAL, INC.,
LONGVIEW MEDIA, INC., ACCESS
MEDIA NETWORKS, INC.,
ALCHEMY F/X, INC., INNOVATIVE
NETWORKS, INC., BINARY
SOURCE, INC., BROADCASTER,
LLC, TRANSGLOBAL MEDIA, LLC,
SOFTWARE PEOPLE, LLC, and
ACCESS MEDIA TECHNOLOGIES,
LLC,

Defendants.

- and -

CASE NO. 2:08-cv-2822 CAS(AJWx)

Assigned to the Honorable Christina A.
Snyder

Related Cases:

CV06-4923 CAS(AJWx)
2:08-cv-02848 CAS (AJWx)

Declaration of Brian Gardner, Esq.

Date Filed: June 27, 2008

Time: 10:00 a.m

Date: July 21, 2008

Trial Date: Not Set

Judge: Hon. Christina A. Snyder

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2 BROADCASTER, INC.

3 Nominal Defendant.
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6 I, Brian Gardner, declare as follows:
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8 1. I am an attorney representing Plaintiff Baytree Capital Associates,
9 LLC, ("Baytree") in the above captioned matter. As such, I have personal
10 knowledge of the facts contained in this declaration. This motion is made following
11 the conference of counsel pursuant to L.R. 7-3 which took place on June 3, 2008.
12 Further, the issues raised herein have been previously discussed with the parties in
13 numerous conversations between counsel, as well as by way of a request for a pre-
14 motion conference to the Court by letter dated April 4, 2008 to the Honorable Louis
15 L. Stanton prior to the transfer of this matter to the Central District of California.
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18 2. In connection with Plaintiff's application for an Order disqualifying the
19 law firm of Loeb & Loeb LLP ("Loeb") as counsel for defendant Broadcaster, Inc.
20 ("Broadcaster") in this matter, I respectfully submit the below listed exhibits. The
21 following exhibits are true copies of documents either obtained from the
22 government, filings obtained or created by me, obtained from independent sources
23 or received during the course of this matter:
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27 Exhibit A Criminal record search results for Defendant Nolan
28 Quan;

1 Exhibit B Complaint in *U.S. v. Bigmailbox.com, Inc., and Nolan Quan*,
2 Index No.: Civil Action 01-606-A (Eastern District of Virginia);

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4 Exhibit C Complaint in *FTC v. Digital Enterprises, Inc., d/b/a Movieland*
5 *et al*, Case No. 06-4923 (Central District of California);

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7 Exhibit D Professor Benjamin Edelman's article regarding Broadcaster;

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9 Exhibit E Broadcaster employee telephone schedule;

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11 Exhibit F Signature pages for settlement agreement in FTC AccessMedia
12 prosecution;

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14 Exhibit G Service Agent page of website of California Secretary of State;

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16 Exhibit H Cited pages from Broadcaster Annual Report, fiscal year ending
17 June 30, 2007;

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19 Exhibit I Resignation letter of Dr. Orza;

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21 Exhibit J Schedule 13D Amendment to the Statement of Beneficial
22 Ownership;

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24 Exhibit K Broadcaster Form 8-K filing;

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26 Exhibit L Declaration of Michael Gardner¹;

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28 ¹ The exhibits referenced in the Declaration of Michael Gardner are annexed hereto as the same exhibit reference as noted in that Declaration at Exhibits "A" through "K". Therefore, when the Declaration of Michael Gardner refers the reader to "Exhibit "A" of the Sullivan Declaration", such exhibit is annexed to hereto as Exhibit "A".

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2 Exhibit M Civil Cover Sheet filed by Loeb & Loeb in the Gardner v. Wade
3 action;

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5 Exhibit N Stipulation extending all defendants time to answer in the instant
6 action;

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8 Exhibit O Stipulation extending Defendant Wade's time to answer in the
9 Gardner v. Wade action;

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11 Exhibit P March 20, 2008 temporary restraining order signed by Judge
12 Louis L. Stanton;

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14 Exhibit Q March 28, 2008 temporary restraining order signed by Judge
15 Louis L. Stanton;

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17 Exhibit R Letter from Sullivan Gardner PC to Judge Stanton dated April 3,
18 2008;

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20 Exhibit S Letter from Loeb & Loeb to Judge Stanton dated April 7, 2008;

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22 Exhibit T Letter from Sullivan Gardner PC to Judge Stanton dated April 9,
23 2008;

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25 Exhibit U Letter from Loeb & Loeb to Judge Stanton dated April 14, 2008;

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27 Exhibit V Notice of Removal filed by Loeb & Loeb on behalf of Defendant
28 Wade in Gardner v. Wade action;

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2 Exhibit W Notice of Appearance, dated April 10, 2008, filed by Michael
3 Armstrong, Esq. of Howrey LLP;
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5 Exhibit X Letter from Howrey LLP to Loeb & Loeb dated June 24, 2008 in
6 the Gardner v. Wade action.
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8 3. The instant matter was initiated by the filing of a complaint on
9 February 17, 2008. Shortly thereafter, by way of Order to Show Cause filed with
10 the Federal District Court for the Southern District of New York, prior to the
11 transfer of this action to the Central District of California, Plaintiff sought and was
12 granted a temporary restraining order by the Honorable Louis L. Stanton, dated
13 March 20, 2008, enjoining the Defendants from spending, transferring, selling or
14 conveying in any manner the funds, assets and/or shares of Broadcaster, Inc. or
15 otherwise encumbering or binding the funds, assets and/or shares of Broadcaster,
16 Inc. except to the extent necessary to pay taxes, rent, utilities, current base salaries
17 of presently existing employees, and attorney's fees as well as enjoining each
18 individual and corporate defendant from transferring outside of the state in which it
19 is currently located, funds, property, or other assets in which each defendant has an
20 interest in as will satisfy any potential judgment. A copy of the March 20, 2008
21 temporary restraining order is annexed hereto as Exhibit "P".
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27 4. The temporary restraining order was thereafter superseded by Judge
28 Stanton's temporary restraining order dated March 28, 2008. A copy of the March

1 28, 2008 temporary restraining order is annexed hereto as Exhibit "Q". That order
2 directed that Broadcaster, its representatives, agents, employees and all persons over
3 which they have control or acting on their behalf are temporarily restrained and
4 enjoined from pledging, encumbering, spending, transferring, selling or conveying
5 in any manner the fluids, assets, and/or treasury stock of Broadcaster, Inc. except in
6 the ordinary course of Broadcaster's business, and that all such ordinary course
7 payments in excess of \$1000 shall be reviewed by outside counsel to Broadcaster.
8 This temporary restraining order remains in full force and effect presently.

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12 5. In conjunction with granting Plaintiff's request for a temporary
13 restraining order, Judge Stanton ordered that expedited discovery take place prior to
14 a hearing on the preliminary injunction in order to assist in the determination of that
15 application. As part of this expedited discovery process depositions of Michael
16 Gardner, the Principal of Plaintiff, Wade, and Nolan Quan, the Chairman/C.E.O.
17 and President of Broadcaster, Inc. respectively, were conducted by the parties.

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20 6. Prior to the completion of depositions, Defendants, by motion dated
21 March 28, 2008, filed an application seeking the transfer of the instant matter to the
22 Federal District Court for the Central District of California. Following the
23 submission of opposition papers by Plaintiff, and reply by Defendants, that
24 application was granted by Order of Judge Stanton dated April 18, 2008.

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27 7. However, prior to the transfer of the instant matter, by way of letter
28 dated April 2, 2008, Plaintiff requested a pre-trial conference the subject of which

1 was to raise the very issues set forth in this application. Specifically, Plaintiff in that
2 letter raised its concerns, and intent to seek the disqualification of Loeb as attorneys
3 for the nominal defendant Broadcaster, based upon various conflicts of interest
4 which existed from Loeb's prior, and then current, representation of adverse parties
5 to the litigation. Loeb responded to these concerns by way of letter dated April 7,
6 2008, to which Plaintiff responded by way of letter dated April 9, 2008. Loeb then
7 filed a short letter in response on April 11, 2008. Copies of the four correspondence
8 are annexed hereto as Exhibits "R" through "U" respectively. However, before a
9 pre-motion conference could be held, Defendants' motion to change venue was
10 granted.
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12 Loeb's Conduct in the Instant Action

13 --- Loeb's representation of Wade in the related action

14 8. In the instant matter, Loeb currently represents the nominal party,
15 Broadcaster. However, simultaneously, Loeb represented the principle defendant
16 Wade in what Loeb itself states is a highly related action. Annexed hereto as
17 Exhibit "M" is a copy of the civil cover sheet submitted by Loeb as part of that
18 firm's notice of removal in the action of Gardner v. Wade, 08-cv-2850. That civil
19 cover sheet provides as an appendix an "Explanation Statement as to Relation of
20 Cases" which states that the matter of "Baytree Capital Associates, LLC v. Quan et
21 al" is a shareholder derivative action on behalf of Defendant Broadcaster arising out
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1 of the same operative facts and effectively involving the same parties, subject matter
2 and disputes as [Gardner v. Wade].”

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4 9. Further, that same civil cover sheet indicates that the attorneys of
5 record for Wade in that action are Michael P. Zweig, Esq. and Eugene R.
6 Licker, Esq. of Loeb. See Exhibit “M”. In the Gardner v. Wade action, Loeb
7 was the only counsel of record, by way of Zweig and Licker, until Armstrong
8 of Howrey LLP joined them as counsel on April 10, 2008. Annexed hereto as
9 Exhibit “N” is a copy of the so-ordered stipulation signed by the parties
10 extending the Company’s time to answer the Complaint in the instant matter.
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12 The attorneys of record listed on that stipulation are again Messrs. Zweig and
13 Licker. Therefore, not only was the law firm of Loeb representing adverse
14 parties, but Zweig and Licker of Loeb are the individual attorneys of record in
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16 both actions.
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19 --- Loeb’s representation of numerous defendants in FTC Action

20 10. As the Court can see, the subject matter of the FTC Complaint, and the
21 actions alleged in that complaint on the part of the parties represented by Loeb,
22 seven (7) of which are named as defendants in this action, laid the foundation for the
23 Defendants’ looting of the assets of the Company. The complained of imbedding of
24 the Malware in the FTC Action was the first act in the scheme the Defendants put
25 into action to steal what assets remained in the Company. Certainly, as part of their
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27 representation of the seven (7) clients noted above Loeb would have been a party to
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1 privileged conversations and confidences concerning each of the FTC defendant's
2 involvement, as well as investigations into, the actions alleged in the FTC
3 Complaint and now, as counsel for Broadcaster, will be forced to cross-examine
4 those former clients with regard to these same issues in the instant matter.
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6 Loeb is leading the defense of this matter
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8 --- Lead in Court

9 11. Though, as will be discussed more fully in Plaintiff's accompanying
10 Memorandum of Points and Authority, which is incorporated by reference herein,
11 the role of counsel for the nominal party corporation is a limited one, which should
12 amount to little more than the filing of an answer, Loeb has seen fit at this early
13 stage to file a motion for change of venue on behalf of all defendants, seek
14 adjournment of time to answer the complaint on behalf of all defendants, reserve the
15 right to move to dismiss the complaint on behalf of all defendants, and argued
16 before this Court concerning the release of assets of all defendants, all at a costs to
17 the Company and seemingly no cost to the individual defendants Loeb has
18 previously represented. Upon information an belief, rather than seek insurance
19 coverage and counsel, Quan and Wade have insisted upon Loeb, and Mallow
20 particularly, due to his representation in the FTC Action.
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1 --- Flew Mallow in for Deposition of Gardner and only one to ask
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3 questions

4 12. As discussed herein, when scheduling the depositions ordered by Judge
5 Stanton, as part of the expedited discovery process, the scheduling of those
6 depositions, at least from defendants' point of view, revolved around the schedule of
7 Michael Mallow of Loeb. Mallow, who was lead counsel for the various defendants
8 represented by Loeb in the FTC Action, was clearly leading, and continues to lead,
9 the defense of this matter for the Defendants. Additionally, not only was attendance
10 at the various depositions mandated by Defendants, but when the deposition of
11 Gardner was conducted, Mallow was the only attorney for the parties which asked
12 questions. Licker, Zweig, and Armstrong did not ask a single question of Gardner at
13 any point during the three hour deposition.²

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17 --- Removal and applications all made by Loeb

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19 13. In the various related matters there have been numerous motions and
20 applications filed by the defendants including the motion to change venue in the
21 instant action, the motion to dismiss or change venue in the Gardner v. Wade and
22 Goodman v. Wade actions, requests for extensions of time to answer in all actions,
23 requests for pre-motion conferences in all actions, along with other applications.
24 Upon information and belief, all of these applications have been made by Loeb.
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28 ² They were so insistent on Mallow conducting the deposition that he was the only questioner even after objections
were raised due to his lack of admission to practice in the S.D.N.Y. where the action was pending at the time.

1 None of the other counsel has filed their own, independent, applications seeking any
2 relief in any of the four related actions. The only time the other counsel for
3 defendants' names appear on any document is as the joint filer along with Loeb. In
4 fact, the recent motion to dismiss or change venue in the Gardner v. Wade action, in
5 which Armstrong is allegedly now the lead counsel for the sole defendant, Wade,
6 the only declaration filed in support of Wade's application, which purports to offer
7 facts upon which the motion to dismiss or change venue is based, is submitted by
8 Zweig. There is no party declaration, nor is there a declaration of Wade's now
9 supposed counsel, Armstrong. The only document on which Armstrong's name
10 appears is the "Joint Memorandum of Law" submitted in support of that application.
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12 Clearly, Loeb is running all of the various litigations referenced herein with
13 Armstrong, and now the law firm of Venable, LLP, acting in name to avoid the
14 additional glaring conflicts which exist by virtue of Loeb's conduct.

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19 Loeb's False Statements In the Instant Matter Concerning Conflict

20 --- Prior Representation of numerous defendants in prior related action.

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22 14. As noted above, Loeb has previously directly represented numerous
23 named defendants in this action. Additionally, during the course of the
24 representation of the corporate clients, Loeb had direct and frequent contacts with
25 several of the individual named defendants herein as officers and directors of the
26 named corporate defendants. The conversations with these individual named
27 defendants would have clearly involved the conduct of those individuals and the
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1 corporations with reference to matters directly at issue in this case. Namely,
2 whether the individuals and companies had engaged in illicit conduct as part of a
3 scheme to fraudulently inflate their company's public appeal.
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5 15. The issues discussed above, and Loeb's potential conflicts in these
6 areas, have been raised with counsel on numerous occasions, both before the Court
7 in the S.D.N.Y. prior to transfer and in private conversation between counsel. Those
8 conversations were formally submitted to the Court by way of Plaintiff's request to
9 Judge Stanton for a pre-motion conference (pursuant to Judge Stanton's individual
10 rules). By letter dated April 3, 2008, Plaintiff requested such a conference and
11 detailed the conflict and reasons which, we submit, mandate disqualification of
12 Loeb as counsel for the Company. A copy of that April 3, 2008 letter is annexed
13 hereto as Exhibit "R". In that letter, Plaintiff laid out for the Court Loeb's conflict
14 arising out of its prior, and current, representation of other named defendants and its
15 conduct showing a clear interest and protection of the non-nominal defendants.
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17 16. In response, by letter dated April 7, 2008, Loeb stated: i) that it
18 represented only Broadcaster, and no other party in any actions, including the
19 Gardner v. Wade action (then also pending before Judge Stanton in which Loeb
20 certified it was a related action involving the same facts and circumstances); ii)
21 Loeb claimed that no conflict arose from its representation of the FTC Action
22 because that action was handled by its Los Angeles office, thereby implying that the
23 Los Angeles office would have no part in this litigation. Finally, Loeb stated that it
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1 had never represented Gardner personally in the past. All three statements made to
2 the Court were outright falsehoods. A copy of that April 7, 2008 letter is annexed
3 heretp as Exhibit "S".
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5 17. First, with reference to Loeb's statement that "Loeb represents only
6 Defendant Broadcaster in this action and the three related actions", this statement is
7 such a blatant misstatement of fact that Licker, the author of the April 7, 2008 letter,
8 should have serious concerns regarding the implications of making knowingly false
9 statements to the Court. At the time of the filing of the April 7, 2008 letter with the
10 CourtLicker, as well as Zweig (also of Loeb), were the sole attorneys of record for
11 Wade, in the Gardner v. Wade action. In that action, they were the only attorneys
12 for the only defendant, Wade, in an action that these same attorneys certified with
13 the Court as arising out of the same issues and facts that were involved in the instant
14 action. As if this were not egregious enough, Licker and Zweig, as attorneys for
15 Wade in the Gardner v. Wade action, co-signed the Notice of Removal, dated March
16 18, 2008, and caused such document to be filed with the Clerk of the Court for the
17 Southern District of New York. A copy of Notice of Removal is annexed hereto as
18 Exhibit "V". Moreover, Licker and Zweig co-signed a stipulation as Wade's
19 counsel extending Wade's time to answer the complaint in the same action. This
20 stipulation, which was so-ordered by the Court on March 25, 2008, evidences that
21 within two weeks of drafting the April 7, 2008 correspondence, Licker was not only
22 the sole and lead counsel for Wade as indicated by the Pacer System at the time of
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1 the April 7, 2008 correspondence, but that he was actively engaged in the
2 representation of Wade in that action. A copy of that stipulation is annexed hereto
3 as Exhibit "O". Therefore, it is somewhat beyond incredulous for Licker to state
4 falsely to the Court that on April 7, 2008 "Loeb represents only Defendant
5 Broadcaster in this action and the three related actions."
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8 18. Incredibly, Licker exasperated the situation and his false statements
9 when, following receipt of Plaintiff's April 9, 2008 correspondence in response to
10 Licker's April 7, 2008 misstatements to the Court, Michael Armstrong, Esq. filed a
11 notice of appearance on behalf of Wade in the Gardner v. Wade action, some five
12 weeks after the action was pending. That Notice of Appearance, dated April 10,
13 2008, a copy of which is annexed hereto as Exhibit "W", added Armstrong as co-
14 counsel to Zweig and Licker for Wade in the defamation action. However, it should
15 also be noted that to date Zweig, Licker and Armstrong all remain as co-counsel of
16 record for Wade in the Gardner v. Wade action, there has been no substituting of
17 counsel or removal of counsel. In fact, as recently as June 24, 2008, Armstrong's
18 firm, Howrey LLP, when corresponding with the Court of the adjournment of a Rule
19 16(b) conference before Judge Stanton in the Gardner v. Wade action, continued to
20 cc: Zweig and Licker, despite the fact that they will claim to no longer represent
21 Wade as well as considering that the correspondence neither refers to nor impacts
22 any other case other than the Gardner v. Wade action.
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1 19. Next, In addition to this misstatement of fact as to concurrent
2 representation, Loeb, by Licker, stated in response to Plaintiff's objection to Loeb's
3 participation based upon Loeb's prior representation of numerous named defendants
4 to this action in the FTC Action, that its Los Angeles counsel handled the
5 representation of these defendants in the FTC Action. The clear argument, correct
6 or not, was that the New York Office was not tainted by the prior representation by
7 the Los Angeles Office. However, any idea that Loeb's Los Angeles office would
8 not be involved in the instant matter was quickly found to be false. At the time of
9 the drafting of the previously described correspondence to the Court, Loeb had
10 already indicated to Plaintiff that the depositions which had been ordered in this
11 matter as part of the expedited discovery process set forth by Judge Stanton would
12 have to be scheduled in order to permit the attendance of Michael Mallow, the
13 attorney in Loeb's Los Angeles office (not admitted to practice in New York) who
14 led the FTC Action defense. In fact, when the deposition of Plaintiff, by way of
15 Gardner, was conducted in this matter, it was Mallow, and exclusively Mallow, who
16 questioned Gardner. Armstrong, who at the time of the depositions was counsel for
17 the three first named individual defendants in this action, nor Zweig, Loeb's New
18 York counsel to Broadcaster, asked any questions of Gardner. Mallow, the attorney
19 for Loeb who handled the representation of the various defendants in the FTC
20 Action, had clearly taken the role as lead counsel and even more so now that the
21 action has been transferred to California. The argument that no conflict exists
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1 because the California Office, by way of Mallow, which handled the FTC Action,
2 would not be involved in the instant litigation is clearly an outrageous misstatement
3 to the Court.
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5 20. Finally, Loeb states that it has never represented Gardner, the principal
6 of Plaintiff Baytree and the second largest shareholder of Broadcaster, in prior
7 litigation. However, Loeb did represent Gardner personally with reference to a
8 production agreement for a Broadway show Gardner was financing. This
9 representation, which occurred in 2002, was a joint representation of Gardner and
10 another individual, Roy Furman. Any true conflict search conducted by Loeb would
11 certainly have discovered this prior representation. However, Loeb does not argue
12 that this prior representation presented no conflict; rather it argues that this prior
13 representation never occurred.
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17 21. These glaring and obvious misstatements of fact indicate Loeb's
18 willingness to mislead, and even outright lie, to the Court in order to remain as
19 counsel to Broadcaster, all while acting as the undisputed lead counsel for all
20 defendants. Loeb's conduct here has been anything but neutral, rather they have
21 aggressively led the charge against the Plaintiff, seemingly blind to the fact that any
22 recovery by Plaintiff goes directly to its client Broadcaster. This is only explained
23 by the long and continuing relationship between Loeb and the personally named
24 defendants.
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1 I declare under penalty of perjury pursuant to the laws of the United States of
2 America that the foregoing is true and correct.

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4 Executed this 27th day of June, 2008, at New York, New York.

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6 s/
7 Brian Gardner, Declarant
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